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Mount Laurel and the Fair Housing Act: Success or Failure? A Presentation by the Affordable Housing Colloquium of the Seton Hall University Center for Social Justice with an Introduction and Commentary by Paula A. Franzese

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MOUNT LAUREL AND THE FAIR HOUSING ACT: SUCCESS OR FAILURE?*

*A Presentation by the Affordable Housing Colloquium of the Seton Hall University Center for Social Justice with an Introduction and Commentary by Paula A. Franzese***

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* This article represents, in significant portion, a colloquium that was presented at Seton Hall Law School on October 8, 1991, under the aegis of the Affordable Housing Colloquium of the Seton Hall University Center for Social Justice. The Center for Social Justice is committed to the establishment of a national model for clinical legal education at Seton Hall Law School. The Affordable Housing Colloquium is part of that endeavor. When appropriate, footnotes have been added to supplement and support the information relayed by the speakers in the Colloquium.

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I. Introduction

In 1975, the New Jersey Supreme Court made history with its seminal and unprecedented declaration in *Southern Burlington County NAACP v. Township of Mount Laurel*,¹ ("Mount Laurel I"), that, as a matter of state constitutional law, every developing municipality within the State of New Jersey must ensure a realistic opportunity for the construction of its fair share of the present and future regional need for low and moderate-income housing.² Eight years later, in response to widespread municipal noncompliance and governmental inactivity,³ the court endeavored in *Mount Laurel II*⁴ to aggressively implement the constitutional obligation, prescribing an arsenal of remedies and procedures aimed at providing a meaningful chance for the construction of "decent housing for the poor."⁵

The court's bold and controversial challenge to exclusionary zoning practices⁶ provided the coordinating governmental branches with a compelling impetus to act, an impetus rooted at a minimum in a firm, widely-held resolve to remove the judiciary from the business of land use planning. This resolve yielded the Fair Housing Act ("Act"),⁷ signed into law in 1985. The Act's stated intent is to prescribe "a comprehensive planning and implementation response" to the *Mount Laurel* mandate, replacing the courts with an administrative agency known as the Council on Affordable Housing ("COAH"). The supreme court, mindful of its own long-expressed preference for a legislative solution and pleased with the statute's expressed intent, enthusiastically endorsed the Act in *Hills Development Co. v. Township of Bernards*,⁸ ("Mount Laurel III").

COAH has been in operation for six years. As the need for housing for those of low income and, indeed, for those of little or no income,

1. 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) [hereinafter *Mount Laurel I*].

2. *Id.* at 173-75, 336 A.2d at 724-25. The court derived this mandate from the state constitutional requirements of substantive due process and equal protection, as well as from the state's inherent police powers to regulate land use for the general welfare.

3. See Alan Mallach, *From Mount Laurel to Molehill: Blueprint for Delay*, N.J. REP., Oct. 1985, at 21. ("Looking back in 1983, eight years after the original [*Mount Laurel*] decision, it seemed clear that little lower-income housing had actually been built as a result of the *Mount Laurel* ruling, and not a single unit in Mount Laurel Township itself."); Sen. John A. Lynch, *Mount Laurel Update*, 9 SETON HALL LEGIS. J. 575 (1986) ("The *Mt. Laurel I* decision was ignored by everyone.").

4. *Southern Burlington County NAACP v. Twp. of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983) [hereinafter *Mount Laurel II*].

5. *Id.* at 352, 456 A.2d at 490.

6. See *infra* note 17.

7. N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1986 & Supp. 1991).

8. 103 N.J. 1, 510 A.2d 621 (1986) [hereinafter *Mount Laurel III*].

continues to reach grave proportions, concerns about the Act and the agency's operational effectiveness have assumed a greater urgency and wider relevance. Indeed, the prodigious New Jersey experiment holds lessons both for a nation in the throes of a crisis of homelessness and displacement as well as for individual states grappling with the ills of exclusionary zoning practices.

Much can, and should, be learned from the *Mount Laurel* model and legacy. Ultimately, an agenda for inquiry and reform turns on empirically-rooted responses to several questions. Among these are, first, will the scheme now in place result in more housing?⁹ Second, will that housing be affordable?¹⁰ Third, where will it be located?¹¹

Established in 1990, the Affordable Housing Colloquium of the Seton Hall University Center for Social Justice is engaged in active efforts to address meaningfully these and other issues related to the success or failure of present affordable housing models, and to search for practical solutions to housing needs. The Colloquium has endeavored to gather and interpret the conceptual antecedents and empirical bases for assessing whether *Mount Laurel*, as implemented by the New Jersey Fair Housing Act, is accomplishing its objectives. Through extensive research and responsive discourse, the Colloquium also aims to serve as a catalyst for thought and meaningful action, intended to find and to help implement effective models for the provision of decent housing for all people.

The following presentation, the first in a series of exchanges to be sponsored by the Colloquium, sets forth the historical and theoretical underpinnings of the *Mount Laurel* doctrine, while exploring the viability of existing mechanisms to implement the constitutional imperative. Mr. Art Bernard,* the Deputy Executive Director of COAH,

9. Comprehensive empirical data on the dimensions and extent of municipal participation (or nonparticipation) remains a critical component of this inquiry. The Affordable Housing Colloquium is presently collecting and interpreting relevant statistical data now available from COAH.

10. The *Mount Laurel* trilogy was concerned with the provision of housing for those of low and moderate income, so that, as one intended benefit, workers could afford to live in the communities where they worked. The plight of those of no income — the desperately poor, the unemployed, the homeless — was not taken up by the court. Similarly, in determining eligibility for *Mount Laurel* housing, the statutory specifications rely on the State's low and moderate-income standards, with "low income" defined as up to fifty per cent of the county's median income, and "moderate income" as up to eighty per cent of median income. See N.J. STAT. ANN. § 52:27D-304(c)-(d). These definitions are also set forth by the court in *Mt. Laurel II*, 92 N.J. at 221, n.8 456 A.2d at 421.

11. *Mount Laurel* was aimed at eradicating exclusionary zoning practices, in an attempt to end economic segregation in the State.

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maintains that the plan now in place for realizing affordable housing goals is workable and is, in fact, working. By contrast, Professor Peter Van Doren,* an economist at Yale University, argues that the *Mount Laurel* strategy is fundamentally ill-conceived. Instead of attempting to manipulate housing market outcomes, he suggests that the various efficiency and equity problems in land use are better addressed by a system of wealth redistribution.

Mr. Bernard is responsible for developing the Council's policies and rules. To date, he has mediated disputes related to over 4,000 housing units.

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II. Transcript of Proceedings

PROFESSOR PAULA A. FRANZESE: Welcome to this exciting opportunity for us to place into some perspective the continuing impact, drama, pressure and conflicts of the *Mount Laurel* legacy. Today we will explore with two leading experts, Mr. Art Bernard and Professor Peter Van Doren, the nature of the renown mandate in the State of New Jersey that every developing municipality must provide the opportunity for affordable housing for those of low and moderate income, at least to the extent of that municipality's fair share of the regional need for such housing.¹²

It is now 20 years since the original *Mount Laurel* suit was filed. Is the imperative set into motion then still viable? Is it workable? Is it working? Does it go too far, or perhaps not far enough, insofar as it fails to make provision for those of no income — the ever-increasing ranks of the homeless and the desperately poor, for whom *any* housing, let alone affordable housing, remains out of reach?

To address meaningfully these questions and others, it is helpful to look back briefly at where we have been. To facilitate that endeavor, I would like to provide a thumbnail sketch of the history of *Mount Laurel*.

Mount Laurel is an appellation that applies not only to a place on the New Jersey map, but also to a trilogy of cases that, taken together, have been "ground-breaking," so to speak. Actually, as Chief Justice Wilentz proclaimed in the second *Mount Laurel* ruling, writing for the unanimous New Jersey Supreme Court, "We may not build houses, but we do enforce the constitution."¹³ It was back in 1975, in *Mount Laurel I*, that the court determined that the state constitution mandates that every developing municipality must provide for its fair share of the regional housing need for those of low and moderate income.¹⁴

Mount Laurel I was a lawsuit brought in the early 1970's by lawyers working for Camden Legal Services.¹⁵ It was directed against a

12. *Mount Laurel I*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

13. *Southern Burlington County NAACP v. Twp. of Mount Laurel*, 92 N.J. 158, 352, 456 A.2d 390, 490 (1983).

14. *Mount Laurel I*, 67 N.J. at 173-75, 336 A.2d at 724-25.

15. The actual plaintiffs in the case fell into four categories: (1) present residents of the township residing in dilapidated or substandard housing; (2) former residents who were forced to move elsewhere because of the absence of suitable housing; (3) nonresidents living in central city substandard housing in the region who desire to secure decent housing and accompanying advantages within their means elsewhere; and (4) three organizations representing the housing and other interests of racial minorities. *Id.* at 159 n.3, 336 A.2d at 717.

township, Mount Laurel, that was just entering a period of large-scale development, with some scattered and dilapidated rural areas remaining from an earlier development period. Faced with a rapid rate of growth that could threaten its tax base and increase the demand for public services, the Township reacted with a number of measures designed to avoid those effects. It zoned nearly one-third of its land to industrial uses — uses that would generate high tax revenues and require few services. The remaining land was devoted to single-family detached dwellings in the conventional subdivision pattern — permitting only houses of significant size and expense, affordable only to those families of middle or higher incomes.¹⁶

The challenge to this scheme was phrased largely in terms of racial exclusion. Ultimately, and interestingly, the New Jersey Supreme Court transmuted the dispute into a case involving segregation along economic lines, concluding that the Township's exclusionary zoning practices¹⁷ had the effect of excluding the poor. Mount Laurel had made no provision for low-income housing. Indeed, it seemed hostile to the idea. In the court's estimation, the Township's land use control pattern resulted in economic discrimination, in a rather obvious and transparent way.¹⁸ Mount Laurel's zoning regulations prevented the construction of low-cost housing, thereby locking out those segments of the community deemed undesirable: the poor, the elderly, and ra-

16. In a concurring opinion, Justice Pashman discussed the widespread use of "inherently exclusionary zoning" devices such as setting minimum house size requirements, as well as minimum requirements for lot size and frontage; prohibiting multi-family housing and mobile homes; developing bedroom restrictions which limited the number of bedrooms which could be included in each dwelling unit; and overzoning for non-residential uses such as industrial parks, office parks and manufacturing complexes. 67 N.J. at 197-203, 336 A.2d at 737-40.

17. Exclusionary zoning may be defined as "local land use controls that have the effect of excluding most low-income and many moderate-income households from suburban communities and, indirectly, of excluding most members of minority groups. . . ." DANIEL MANDELKER & ROGER CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT* 304 (1985). By contrast, inclusionary zoning refers to any number of techniques, such as mandatory set-asides or density bonuses, intended to compel or encourage the development of low-income housing. See Thomas Kleven, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 UCLA L. REV. 1432 (1974).

18. The court's language on this point echoed the sentiments of the lower court:

Through its zoning ordinances, [Mt. Laurel] has exhibited economic discrimination in that the poor have been deprived of adequate housing and the opportunity to secure the construction of subsidized housing, and has used federal, state, county and local finances and resources solely for the betterment of middle and upper-income persons.

67 N.J. at 170, 336 A.2d at 723 (quoting *Southern Burlington County NAACP v. Twp. of Mount Laurel*, 119 N.J. Super. 164, 178).

cial minorities.¹⁹ One incongruous result of this scheme: it was impossible for many Township employees — the workers in Mount Laurel's industrial zones — to actually live in the community where they worked.

Mount Laurel I was written by Justice Hall as his farewell to the bench. It is considered by many to be the most important zoning opinion since the United States Supreme Court's celebrated pronouncement in *Village of Euclid v. Ambler Realty Company*.²⁰ The decision established, without dissent, that every developing municipality must act affirmatively to provide a realistic opportunity for the location, within its borders, of its fair share of the regional need for low and moderate-income housing.²¹ In accord with this mandate, Mount Laurel was ordered to amend its zoning ordinances in order to correct existing deficiencies. The Township was given the opportunity to act without judicial supervision, but, the court warned, should Mount Laurel fail to respond meaningfully, further judicial action would be warranted.²²

There was a problem with this order, however, since it was not quite clear just what response was mandated by the court's pronouncement.²³ Particularly problematic was the decision's failure to

19. In addition to these groups, the court noted that single persons and large growing families not in the poverty class, but who still could not afford to secure the kinds of housing realistically permitted, were also victims of Mount Laurel's zoning practices. *Id.* at 159, 336 A.2d at 717.

20. 272 U.S. 365 (1926). In this case, an owner of unimproved land brought suit against the village where the land was located in an attempt to enjoin the enforcement of a restrictive zoning ordinance. The ordinance in question sought to impose zoning regulations which would have separated the village into industrial and residential sectors. The landowner argued that the ordinance reduced the value of his property and amounted to an unfair deprivation of liberty and property without due process of law. In upholding the ordinance, the Supreme Court reasoned that it had been adopted for a valid purpose and that the legislative judgment of the ordinance was controlling, even if the landowner suffered a constitutional injury.

21. *Mount Laurel I*, 67 N.J. at 173-75, 336 A.2d at 724-25. The court derived this mandate from the state constitutional requirements of substantive due process and equal protection, invoking as well the state's inherent police powers to regulate land use for the general welfare. *Id.*

22. *Id.* at 192, 336 A.2d at 734. The court declined to prescribe remedies to effectuate its mandate, reasoning that:

It is not appropriate at this time, particularly in view of the advanced view of zoning law as applied to housing laid down by this opinion, to deal with the matter of the further extent of judicial power in the field or to exercise any further power The municipality should first have full opportunity to itself act without judicial supervision.

Id.

23. By contrast, the lower court's order was more specific, requiring Mount Laurel to undertake studies analyzing factors related to the housing needs of the Township's low and moderate-income residents; estimate the number of units required to meet this need;

define the component parts of its new edict. For example, what is a "developing municipality"? When is housing "affordable"? How would the "regional need" for such housing be ascertained? How would a qualifying municipality's "fair share" of that need be calculated?²⁴ The gaps that lingered are reminiscent of an old tale, which offers a less than flattering portrayal of our profession and the legal method. Two people were up in a balloon, and they were lost. They spotted someone on the ground and yelled, "Hello, where are we?" The person yelled back, "You're up in a balloon." One balloonist then said to the other, "That person below is a lawyer." "How do you know?" asked the bewildered companion. The balloonist replied, "He spoke with confidence, he answered dispositively, and what he said was totally useless." Hours later, the still airborne duo spotted another person on the ground. "Excuse me, but where are we? Please help us," they yelled. This time, the person below went on, for an hour and a half, in response. The balloonist then said to her friend, "That person is a supreme court judge." "How do you know?" asked the friend. "Well," came the reply, "He told us more than we wanted to know about where we've been, he outlined all of the places where we could have landed safely, but he hasn't given us a hint on how to get to any of them."

Perhaps because of the definitional gaps in the court's pronouncement, and surely no doubt as a consequence of municipal resistance to the very heart of the mandate, *Mount Laurel I* generated little more than studied inaction.²⁵ In 1983, the court's first decision was vigorously reaffirmed in *Mount Laurel II*,²⁶ a unanimous opinion that was two and one-half years in the making. Angered and frustrated by the lack of progress in the development of adequate housing for people of low and moderate means,²⁷ the court, led by Chief Justice Wilentz, asserted that it had no choice but to act more aggressively to compel

and develop an implementation plan in accordance with the results of the study. Further, Mount Laurel was told to comply with the court's order within 90 days. *Southern Burlington County NAACP v. Twp. of Mount Laurel*, 119 N.J. Super. 164, 178-79 (1972).

24. It has been suggested that the *Mount Laurel I* court's failure to define the constitutional mandate "slowed voluntary compliance by municipalities because the municipalities remained uncertain as to what their obligations entailed." G. Alan Tarr & Russell S. Harrison, *Legitimacy and Capacity in State Supreme Court Policymaking: The New Jersey Court and Exclusionary Zoning*, 15 RUTGERS L.J. 513, 519 (1984).

25. See *supra* note 3.

26. 92 N.J. 158, 456 A.2d 390 (1983).

27. The court's displeasure is reflected, for example, in its observation that: After all this time, ten years after the trial court's initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance. Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mount Laurel's determination to exclude

municipal compliance.²⁸

The court's decision in *Mount Laurel II* is profoundly significant in a number of ways. First, it states specifically that a municipality's planning and zoning powers must not be used to favor rich over poor.²⁹ The decision also represents a policy of judicial activism, suggesting that when the Legislature fails to vindicate a major constitutional right, it is incumbent upon the judiciary to step in to enforce that right.³⁰

To put "muscle" and "steel" into its mandate, the court in *Mount Laurel II* prescribed a veritable arsenal of measures, including the controversial "builder's remedy," a form of redress which gave builder-plaintiffs an incentive to challenge exclusionary zoning ordinances.³¹ The builder who waged a successful *Mount Laurel* suit and proposed a development that would provide for some lower and moderate-income housing would be granted a court order permitting him or her to proceed with that development, notwithstanding the objections of the targeted municipality's zoning board.³² Future *Mount Laurel* litigation would be handled by three designated judges charged with responsibility for determining "fair share" for their assigned region, evaluating the merits of challenges to a qualifying municipality's zoning scheme, and overseeing the process of promulgating and enforcing conditions to guide and control development.³³

Throughout, the supreme court acknowledged that its prescription for achieving the *Mount Laurel* obligation resembled "traditional executive or legislative models."³⁴ Mindful of the inherent limitations of judicial intervention, the court emphatically stated its preference for legislative over judicial action. Recognizing that the sore absence of political consensus posed a formidable obstacle to the passage of responsive legislation, the court concluded that enforcement of the constitutional rights at stake could not await a supporting popular

the poor. *Mount Laurel* is not alone: we believe that there is widespread compliance with the constitutional mandate of our original opinion in this case.

Id. at 198-99, 456 A.2d at 410.

28. *Id.* at 200, 456 A.2d at 410.

29. *Id.* at 209, 456 A.2d at 415.

30. See Paula A. Franzese, *Mount Laurel III: The New Jersey Supreme Court's Judicial Retreat*, 18 SETON HALL L. REV. 30, 46-54 (1988) (exploring the *Mount Laurel* trilogy as illustrative of the separateness as well as the interdependence of the governmental powers).

31. *Mount Laurel II*, 92 N.J. at 278-81, 456 A.2d at 452-53.

32. *Id.* at 279-80, 456 A.2d at 453.

33. *Id.* at 253-54, 456 A.2d at 439.

34. *Id.* at 287, 456 A.2d at 465.

concordance.³⁵

The supreme court's zealous initiative in *Mount Laurel II* generated impassioned dissent as well as vigorous praise.³⁶ It was lauded by some as an example of bold and brave humanitarianism, daring to assume that basic democratic values could be upheld and vindicated.³⁷ Conversely, it was denounced by others as an anti-democratic usurpation of home rule,³⁸ or as an idealistic but inherently unworkable and arbitrary attempt at manipulation of the free market.

Although it did not inspire consensus on the merits, *Mount Laurel II* did yield at least one accord. It motivated a firm resolve to get the courts out of the business of land use planning and implementation. In 1985, the coordinating branches of government did just that, with the passage of the Fair Housing Act.³⁹ This statute represents the State's first comprehensive legislative response to New Jersey's housing and planning needs, and has been described as "a compromise between radical idealism and reactionary preservationism."⁴⁰ As such, it is a source of excitement as well as frustration. The Act created an administrative agency, the Council on Affordable Housing ("COAH"), with the power to define the regional need for affordable housing, to promulgate criteria and guidelines to enable municipalities to determine their fair share of that need, and to approve or disapprove proposed municipal plans to satisfy that need.⁴¹

The Fair Housing Act has been met with criticism and challenge. It relies on voluntary municipal compliance,⁴² and fails to arm COAH

35. *Id.* at 212, 456 A.2d at 417. In this and in other respects, the court's bold initiative is analogous to the United States Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954).

36. See John M. Payne, *Rethinking Fair Share: The Judicial Enforcement of Affordable Housing Policies*, 16 REAL EST. L.J. 20, 22 (1987) ("It is difficult to convey adequately the intensity of the public reaction to the *Mount Laurel* process since 1983. Where *Mount Laurel I* could be ignored because it was ineffective, *Mount Laurel II* worked and it stirred up a firestorm.")

37. See, e.g., David J. Frizell, *Mount Laurel and Sound Planning*, N.J.L.J., Oct. 13, 1983, at 414-15 (heralding *Mount Laurel* as "a giant step forward" that "will result in a substantial and sustained improvement in land use planning in New Jersey").

38. See Second Annual Message of Governor Thomas H. Kean to the New Jersey Legislature (Jan. 10, 1984), reprinted in N.J. LEGIS. MAN. 486, 498 (1984) (attacking *Mount Laurel II* as representing "an undesirable intrusion on the home rule principle.")

39. N.J. STAT. ANN. §§ 52:27d-301 to -329.

40. Josh Goldfein, *The Legacy of Mount Laurel*, N.J. REP., Nov. 1988, at 21.

41. N.J. STAT. ANN. § 52:27D-307.

42. Pursuant to the statutory scheme, a municipality "which so elects" may adopt a "resolution of participation." N.J. STAT. ANN. § 52:27D-309(a). A "resolution of participation" is defined as "a resolution adopted by a municipality in which the municipality chooses to prepare a fair share plan and housing element in accordance with this act." N.J. STAT. ANN. § 52:27D-304(e).

with mechanisms to compel meaningful response. The Act also creates the regional contribution agreement ("RCA"), which permits suburbs to pay cities for agreeing to absorb up to one-half of the suburb's assessed *Mount Laurel* obligation.⁴³ The notion that wealthier municipalities can "buy-out" part of their Mount Laurel responsibility, coupled with other concerns as to the statute's efficacy, prompted constitutional challenges which were taken up by the supreme court in *Mount Laurel III*.⁴⁴

This third decision in the *Mount Laurel* series resoundingly endorses the legislative response.⁴⁵ Deferring to the statute and providing it the benefit of the presumption of constitutionality,⁴⁶ the court yielded the floor to the Legislature, noting that "no one wants his or her neighborhood determined by judges."⁴⁷ The court did, however, conclude its hopeful demonstration of comity with an admonition of

43. N.J. STAT. ANN. § 52:27D-312. This provision of the Act reads: "A municipality may propose the transfer of up to 50% of its fair share to another municipality within its housing region by means of a contractual agreement into which two municipalities voluntarily enter." However, checks are placed on RCAs to assure fair compliance with the statute. These checks require review and approval by the county planning board, as well as a determination as to whether the agreement provides a realistic opportunity for the provision of low and moderate income housing with convenient access to employment opportunities. *Id.*

44. *Hills Development Co. v. Twp. of Bernards*, 103 N.J. 1, 510 A.2d 621 (1986).

45. Mindful of its own long-expressed preference for a legislative solution, as well as the statute's stated intent to satisfy the constitutional obligation, the court wholeheartedly validated the Fair Housing Act:

The Act that we review and sustain today represents a substantial effort by the other branches to vindicate the *Mount Laurel* constitutional obligation If the Act before us works in accordance with its expressed intent, it will assure a realistic opportunity for lower income housing in all those parts of the state where sensible planning calls for such housing.

Mount Laurel III, 103 N.J. at 21, 510 A.2d at 632.

46. The court hastened to reject contentions that the statutory scheme, as implemented, would provide little more than a superficial palliative:

Most objections raised against the Act assume that it will not work, or construe its provisions so that it cannot work, and attribute both to the legislation and to the Council a mission, nowhere expressed in the Act, of sabotaging the *Mount Laurel* doctrine. On the contrary, we must assume that the Council will pursue the vindication of the *Mount Laurel* obligation with determination and skill. If it does, that vindication should be far preferable to vindication by the courts, and may be far more effective.

103 N.J. at 21, 510 A.2d at 632.

47. *Id.* The deference which characterizes *Mount Laurel III* tacitly recognizes that even the most resolute judicial participation in the vindication of constitutional rights should exist in the form of a continuous and fluid colloquy with the legislature and the executive, administrative agencies and the public. Yielding to the coordinating branches' efforts, the court's abdication of a policy-making role seemed guided in part by a responsiveness to the possibility, if not the likelihood, that in assuming such a role it had exceeded the range of political tolerance.

sorts: "Our deference today in no way signals a weakening of our resolve to enforce the constitutional rights of New Jersey's lower-income citizens. The constitutional obligation has not changed."⁴⁸

What, then, *has* changed in the six years since COAH has been in operation? The State has estimated that, for the years 1987 to 1993, there is a statewide need for approximately 146,000 housing units for the Mount Laurel-eligible population.⁴⁹ How many units have been built thus far, and where? For that matter, who is the "Mount Laurel-eligible population"? How has the Council defined "low income" and "moderate income"? Where does that leave those families and individuals of no income? How viable an agency is COAH itself? Where has it been and where is it headed? In the face of municipal resistance and gloomy economic forecasts, can we expect voluntary and meaningful realization of the *Mount Laurel* mandate, or is the judiciary destined to re-enter the fray in an attempt to force compliance? Is the very notion of forced compliance an oxymoron of sorts, with the court's refrain in *Mount Laurel II* haunting us still: "We cannot build houses, but we can enforce the constitution?"

To address these questions and others, we are pleased to have with us today Mr. Art Bernard and Professor Peter Van Doren. Mr. Bernard, the Deputy Executive Director of the Council on Affordable Housing, has been with the agency since its inception. He is a licensed professional planner, responsible for most of COAH's policy development. Mr. Bernard maintains that the *Mount Laurel* mandate and the plan now in place for realizing affordable housing goals are not only workable — they're working.

Professor Van Doren is a former Assistant Professor of Politics and Public Affairs at Princeton University's Woodrow Wilson School and is currently teaching at the Yale School of Organization and Management. He has argued that the *Mount Laurel* strategy is fundamentally ill-conceived, and not likely to accomplish its worthy objectives, including the provision of better housing for low-income persons.

Ladies and gentlemen, may I present to you Mr. Art Bernard.

MR. ART BERNARD: I want to thank you for inviting me to this first conference. Where do I start? I think it's fair to say that the Council on Affordable Housing was born out of the supreme court's two *Mount Laurel* decisions, and let me just backtrack to the second one for a bit, because the first decision did leave an ambiguity, as Paula [Franzese] said, about the constitutional obligation of every de-

48. *Id.*

49. See Goldfein, *supra* note 40.

veloping community. The second *Mount Laurel* decision went a step further and clarified that every community has this constitutional obligation to provide its fair share of a regional low and moderate-income housing need. So all of us share in this obligation. For those of you who aren't familiar with the definitions of "low" and "moderate" incomes, low-income people are those who earn less than 50 percent of the region's median income. Moderate-income people are those who earn anywhere from 50 to 80 percent of the region's median income.⁵⁰

As Paula [Franzese] said, an integral part of the second *Mount Laurel* decision was this concept of a builder's remedy,⁵¹ where there was an incentive for builder-plaintiffs to initiate litigation. As community after community found itself dragged into court and saw its zoning powers usurped, there was enough pressure in the legislature to pass the Fair Housing Act in 1985.

In addition to establishing the Council, one of the important things that the Act does is to require every community to formulate a plan to meet its low and moderate-income housing obligation.⁵² They have to adopt a housing element⁵³ if they're going to keep the presumptive validity of their zoning ordinances, and this housing element must be part of their master plan. It's part of the plan for the community.

In establishing the Council, the Legislature gave the Council some very specific direction. For instance, it told the Council to establish housing regions throughout the State. It told the Council to quantify the need for housing in each of these housing regions and then to come up with a way to distribute that need to each municipality within that region. And then, perhaps most importantly, it told the Council to establish criteria that parties could rely on in developing a housing element and in reviewing a housing element.⁵⁴ The process that the Legislature set up is essentially voluntary.⁵⁵

Communities, once they complete this housing element and adopt it, can file it with the Council, but they don't even have to do that. If they do not file it with the Council and they are subsequently sued,

50. See *supra* note 10.

51. See *supra* note 31 and accompanying text.

52. See N.J. STAT. ANN. 52:27D-309. Prior to the passage of the Fair Housing Act, local planning and land use in New Jersey was regulated by the Municipal Land Use Law, 1975 N.J. LAWS 291.

53. A "housing element" is that portion of a municipality's master plan designed to achieve the goal of access to affordable housing to meet present and prospective housing needs, with particular attention to low and moderate income housing. See N.J. STAT. ANN. § 52:27D-310.

54. These directives are set forth in N.J. STAT. ANN. § 52:27D-307.

55. See *supra* note 42 and accompanying text.

the municipality would remain in court and the community would be subject to this builder's remedy that everyone had been so upset about.

A community that files a housing element with the Council now has two years after that filing to petition for certification or to ask the Council to review the element and approve it. If the given municipality does not petition within that two-year period, then, again, it is probably subject to a builder's remedy, vulnerable to a lawsuit.

So the cases that come before the Council are presented by those communities that voluntarily take advantage of the opportunity to plan and do a housing element. The communities that take advantage of the opportunity to file a housing element with the Council are also, for the most part, those communities which petition the Council for certification within a two-year period of time. Now, this two-year limit is relatively new. It was a legislative change last year.⁵⁶

In coming up with this housing element, communities have a fair amount of flexibility. If they have substandard housing in town, well, they can rehabilitate it. They can choose to zone and to let the private sector build all of the housing for them. They can choose to create a process in which the community itself, perhaps through a nonprofit organization, can build the required housing.

They [the communities] can even, under the Fair Housing Act, take advantage of the regional contribution agreement ("RCA") and enter into an agreement with another community to accept up to 50 percent of their obligation.⁵⁷ With a RCA, there are sending communities and receiving communities. There is cash that usually changes hands between the sender and the receiver. The sender is usually a suburban community. The receiver is usually an urban center.

Once the Council gets a case, either through a petition for certification or a lawsuit within this two-year framework I was talking about, a clock begins and there is a 45-day period in which the staff reviews the housing element and anyone else can review it.⁵⁸ Anyone in this room could review the housing element, and if he or she had a problem with it, register an objection with the Council.⁵⁹ Having done so, the Fair Housing Act mandates that the Council sit down in a mediation session and try to negotiate an end to the dispute between the municipality and the objectors to the plan.⁶⁰ I think that one of the

56. See N.J. STAT. ANN. § 52:27D-313 (West 1986 & Supp. 1991).

57. See *supra* note 43 and accompanying text.

58. See N.J. ADMIN. CODE tit. 5, §§ 91-1-14.6 (Supp. 1991).

59. *Id.*

60. *Id.*

more innovative things that the Fair Housing Act did was to create this alternative for dispute resolution. Still, the parties are told as mediation begins that there's a limited amount of time to resolve their disputes and that if they can't resolve their problems in this limited amount of time, that the case may be sent to an administrative law judge for fact-finding. Moreover, the parties are told that whether the matter goes to this judge or not, the Council is going to make decisions for them. Given that dynamic, we've found that parties are willing to talk and that mediation is an effective means of dispute resolution.

Now, for some summary graphics.⁶¹ This map, for those of you who don't recognize it, is New Jersey. The hot markets in New Jersey are the areas that have the infrastructure to support the growth, that have the traffic networks and the access to markets, that have the land necessary to address growth. Most of these communities in New Jersey have somehow remained unaffected by the *Mount Laurel* decision.

There is planning going on. There is zoning in place for housing to be built and in some cases, the communities are building the housing themselves. You can see that in the Pinelands, where we have environmental constraints that preclude higher densities, there isn't much activity. In the northwest part of the State, where we have a lack of infrastructure, and in the northeast where there is a lack of land, there's been a lack of litigation or petitions for certification.

Regarding activity before the courts and before my organization, [the Council], about 70 cases, I would guess, have probably settled in court, and the 70 cases that are before the courts we estimate have produced plans for over 25,000 units. We have certified probably one hundred and thirty communities at this point for close to 17,000 units, so that there are real plans to build and rehabilitate approximately 42,000 units right now.

I think it is fair to say that much of the activity depicted on this map was driven by the private sector and its desire for profit under the *Mount Laurel* edict of the builder's remedy. I think it's also fair to say that much of this took years to settle and cost millions of dollars between parties in trying to reap some sort of settlement that the municipality, the developers, and the housing advocacy groups could accept.

Now, where are we going? Right now the Council is going through

61. The graphics presented at the Colloquium included a table and map summarizing *Mount Laurel* housing activity. The information contained therein was compiled by COAH and is available at COAH's office in Lawrenceville, N.J.

a comprehensive review of its rules and the reality we are facing is somewhat different from the reality of 1983. For one thing, the market is different. In 1983, the market for townhouse and condominium units was plentiful; in 1991, that market has dried up and shifted more towards single-family units. This makes it necessary for our rules to adjust to the changing market.

I think we know that developers and municipalities have become more adept at negotiating deals that avoid litigation, but do not benefit the poor. We know that the Public Advocate's Office has been cut back and they have been a major player in this [the implementation of *Mount Laurel's* inclusionary zoning edict].⁶² Because of this, it appears that litigation will be a less effective mechanism for implementing the *Mount Laurel* obligation. This means we have to come up with a way to encourage communities to plan and come forth voluntarily rather than waiting for the private sector to sue.

PROFESSOR FRANZESE: In response, I am delighted that we have Professor Van Doren with us to present some of his arguments and also some of his larger economic concerns.

PROFESSOR PETER VAN DOREN: It is not my intention today to be the bad bearer of economic reasoning and reinforce the stereotype that lawyers and sociologists favor progressive social change while economists favor the *status quo*. Rather, my goal today is to impress upon you that housing is bought and sold in markets just like cars, energy, and toothpaste, and that housing market outcomes can be successfully altered without causing other problems only if policies are designed with economic insights in mind.⁶³

Normally, we teach students that a system of property rights and prices signals to firms and consumers the proper information about an efficient allocation of goods and services in markets. Under some conditions, however, private markets do not efficiently provide commodities. In these situations, which are called market failures, markets over-provide or under-provide commodities compared to the efficient level.⁶⁴

Private markets under-supply public goods because consumption cannot be restricted to those who pay. Entrepreneurs who tried to make a living by privately supplying goods would go out of business.

62. See *infra* note 75.

63. See Mark A. Hughes & Peter Van Doren, *Social Policy through Land Reform: New Jersey's Mount Laurel Controversy*, 105 POL. SCI. Q. 97 (1990).

64. See EDWARD J. MISHAN, WHAT POLITICAL ECONOMY IS ALL ABOUT 119-63 (1982).

Private markets over-supply commodities in situations in which property rights do not exist for all the inputs that are used in the production of that commodity. The lack of property rights for air and water, for example, leads to overuse of these resources and environmental pollution.

Now, public policy, of course, can remedy both positive and negative market failures. Governments, if they read Paul Samuelson's 1954 article,⁶⁵ can supply an optimal amount of public goods, and if they read Ronald Coase's 1960 article,⁶⁶ can solve negative externalities by creating property rights for harms and allowing them to be bought and sold.

Now, what does this have to do with land markets and housing markets? Private unregulated land markets exhibit negative market failures because people can be negatively affected by land uses that are nearby spatially without their consent. For example, in completely free land markets, scrap yards and beef tallow plants — my two favorite examples — can locate next door without consent.

Now, there's a trickier kind of externality in housing markets without zoning, once we introduce the property tax to raise revenue.⁶⁷ The property tax creates incentives to consume local services, but not to own much property and land wealth so that one can consume these public services and not pay much for them. Public policy can correct both of these kinds of market failures through the creation of land-use rights, what we usually call zoning, but whenever we create property rights, we face a non-economic decision about whom to allocate these rights to before we start the market in question.

In petroleum offshore drilling rights, for example, the government does not give away these rights. Rather, it auctions them off. It creates the property rights to drill the oil, but it does not give these away for free. Again, it auctions them off. For those of you who know something about telecommunications, when the property rights in radio broadcasting were created, they were just given away for free to early broadcasters in the 1920's. So across the series of examples where we've had to create property rights from scratch, we have both sold and given them away.

Now, states, in effect, have allowed localities to create collective

65. Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 386 (1954).

66. Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

67. See generally Peter Miezowski & George Zodrow, *Taxation and the Tiebout Model: The Differential Effects of Head Taxes, Taxes on Land Rents, and Property Taxes*, 27 J. ECON. LIT. 1098 (1989).

zoning rights without having to pay for them. Alternatively, states could give outsiders, that is non-incumbent residents, these zoning rights and force communities to have to pay outsiders not to come in. This practice differs from the current situation in which outsiders have to pay the incumbent residents to be permitted to enter.

Both of these solutions — these allocations of property rights — solve the efficiency problem, that is, the lack of the market for harms in land use, but they have very different equity implications. The former describes the system in New Jersey from 1920 through 1975 which, in effect, gave zoning rights to suburban residents without charge. *Mount Laurel* simply switches those property rights and gives them, in effect, to outsiders and forces incumbent residents to bribe outsiders not to come into their community.

Now, an additional complication in zoning exists because if you give property rights to those who already have wealth and the demand for the commodity is "wealth elastic,"⁶⁸ the equilibrium amount of the commodity will be larger than in the situation where the initial property rights had to be purchased. So the particular way that we gave property rights to suburbs for free not only had equity consequences, it also increased the amount of zoning restrictiveness that we observe. We probably have a higher rate of zoning restrictions in suburbs because they've not had to pay for those property rights, and by giving them for free, it in fact raised their demand for this "wealth elastic" good above what it would have been if we had given them to outsiders in the first place. Now, *Mount Laurel*, in effect, redistributes property rights to the less advantaged much like land reform in El Salvador redistributes to peasants with very little wealth.⁶⁹

What benefits do *Mount Laurel* supporters believe will result from this redistribution? One, better housing; two, better educational opportunities for some poor children; three, an improved employee/employer spatial match because there are jobs in the suburbs but no housing that can be afforded by workers. There may be some gains to trade if people with less income could be in the suburbs and closer to jobs. Fourth, *Mount Laurel* hopes to create spatial socioeconomic integration. If low-income citizens were in greater proximity to upper-income citizens, they would soak up culture and values that would allow them to better succeed in our economic systems.

68. See WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS* 104-24 (1985).

69. The land redistribution which is being sought via the Central American and Mexican Revolutions is somewhat analogous to the land distribution efforts resulting from the *Mount Laurel* scheme.

Now, what's the evidence about the ability of *Mount Laurel* to do any of these things? Well, first, let's take better housing. Analytically, we could separate getting better housing for people from relocating people spatially. You could just give money. You could just give wealth redistribution to poor people and allow them to locate wherever they wish and they might very well end up in cities where they are now, but they would have much more high-quality housing. Similarly, we could spatially relocate poor people and do nothing about their housing quality. We could have tenements located everywhere spatially without doing anything about housing quality.

Mount Laurel is trying to do both those things at the same time. It's trying to redistribute incomes across space and it's trying to change housing quality at the same time. The reluctance of local jurisdictions to tax themselves to raise housing quality — after all, the only way to raise housing quality is to tax some and give it to other folks — led them to rely on the builder's remedy. What the builder's remedy taxes is rents, it taxes the excess profits in a housing boom that arise because the supply of market rate housing is less than demand so the price rises above cost. The builder's remedy taxes some of the rents and uses them to build low and moderate-income housing. Once the housing boom ends, there are no rents and without rents, you're not going to get any developer to be willing to build *Mount Laurel* units in return for building market rate housing.

As to providing better educational opportunities for some poor children, well, if you look at the educational econometric literature,⁷⁰ quite frankly we don't know what really matters in terms of education. Economists have regressed every input known to mankind on the right-hand side where the left-hand side of an equation is school performance and the coefficients always come up zero. No input that school boards seem to control seems to have a definitive impact on school performance. So it's not clear to me that socioeconomic mixing per se will increase school performance.

As for the employer/employee spatial mismatch, we probably could move workers to jobs from cities to suburbs using van pools and that's a whole lot cheaper than building houses. We probably could move a lot more workers to jobs. Secondly, the evidence shows that black workers in particular suffer much more from racial discrimination in the labor market per se than from location disadvantages.⁷¹ So if we really have scarce resources and want to use them efficiently, we

70. See, e.g., Eric Hanushek, *The Economics of Schooling*, 24 J. ECON. LIT. 1141 (1986).

71. See Mark A. Hughes & Janice F. Madden, Residential Segregation and the Eco-

should put our enforcement tools into ending labor market segregation as opposed to using that marginal public dollar for housing programs.

To conclude, there's one final aspect that I want to talk about, which is this very difficult-to-get-across concept that economists traffic in, so called "deadweight loss."⁷² You see, when we point to new housing units that are built in response to *Mount Laurel* — and I'm not criticizing Mr. Bernard at all because this is his job to do this — what you see is not necessarily what you get, because there's been a response in the private housing market that isn't charted here. The private suppliers of low-income housing take into account the fact that they now have a competitor, known as the state, that is supplying this housing.

I'm not going to argue that there's been no net change in the number of low-income units because I don't think that's absolutely correct. Still, the net increase in low-income units is actually less than the number of new units that have been built, because these new units compete with the private supply, what housing analysts call "filtering."⁷³ It's very difficult to get across the concepts of deadweight loss and filtering in this kind of format, which is why economists always come out looking very bad in these things and I'll end on that note. Thank you.

PROFESSOR FRANZESE: The members of the Law School's Colloquium on Affordable Housing⁷⁴ are present today, and have been involved in a host of fact-finding and law-finding efforts in order to begin asking the right questions. The first in our series of queries will be presented by Professor Angela Carmella.

PROFESSOR ANGELA CARMELLA: My question is for Mr. Bernard. It relates to two groups of people that I'm thinking of; specifically, those with household incomes below 40 percent of median income and the homeless. These obviously comprise a desperately poor segment of our society in desperate need of housing. First, are these groups of people factored into the determination of regional

omic Status of Black Workers: New Evidence for an Old Debate, Working Paper in Regional Science, University of Pennsylvania, 1987.

72. See HAL R. VARIAN, MICROECONOMIC ANALYSIS 253-89 (1984).

73. See Robert C. Ellickson, *The Irony of Inclusionary Zoning in RESOLVING THE HOUSING CRISIS* 135-87 (M. Bruce Johnson, ed., 1982).

74. The Colloquium is comprised of an interdisciplinary group of Seton Hall faculty, clinicians, practitioners, students, and community activists, all of whom possess some expertise in the area of affordable housing. It is chaired by Professor Bernard Freamon of Seton Hall Law School.

need for housing, and secondly, is *Mount Laurel* at all responsive to these particular groups? If so, in what way, and if not, are there plans for the development of strategies for addressing the specific needs of the homeless and the very, very poor? Thank you.

MR. BERNARD: Well, the decision and the Fair Housing Act make no distinction about people making various incomes. As a matter of practice in setting up our program, we have established the price of sales of housing ranging in affordability to people of 40 percent of median income to 80 percent of median income. That was done to face the realities of homeownership and qualifying for a mortgage.

In addition, we have tried to create some rental opportunities and we might talk about those later. We've also attempted to encourage some alternative living arrangements for people who are very poor, and there is at least one example in Perth Amboy where we were successful in doing that. People with incomes of, I think, \$6,000 per year have found housing that way. With all that, we nonetheless have not been very successful in creating housing opportunities for those with less than 40 percent of median income.

Now, your question about the homeless. Last time the Council did not include the homeless in its estimate of the housing need. The inclusion of those presently living in sub-standard housing, as well as future projections for lower-income people, however, was consistent with the direction provided by the supreme court. As for the homeless, the Council is currently reviewing its methodology and considering whether to include this portion of the population in the future, so at the present time it remains undetermined.

PROFESSOR BERNARD FREAMON: Mr. Bernard, I also have a question. As Professor Franzese mentioned, one of the engines behind the initial *Mount Laurel* litigation had to do with segregated housing patterns, housing patterns in New Jersey determined primarily on the basis of race.

Isn't it true that the regional contribution agreements you referred to — and perhaps you can explain a little more about what they are — isn't it true that those agreements, where a suburban town can "sell off," so to speak, its fair share obligation to an urban town, tend to continue rather than break down those segregated housing patterns? Also, the suburban towns tend to have preferences, so that senior citizen housing and those kinds of units that are built as part of

the fair share obligation, also continue to segregate housing.⁷⁵

MR. BERNARD: To the extent that residential preferences and RCAs create less housing for households made up of individuals who do not live or work in a particular community, I suppose there is less integration in the suburbs. However, the Legislature enacted RCAs to allow communities to transfer fifty percent of their obligation, probably because there were benefits in such transfers. In fact, at this point RCAs have resulted in a contribution of over 62 million dollars into New Jersey's cities to create over 3,000 affordable units.

With regard to residential preferences, our data suggests that few communities can fill half of their units with existing residents. This means they must market the majority of their units elsewhere in the housing region.

MR. CHRIS SANTORA: Mr. Van Doren, *Mount Laurel* legislation is a definite step to providing housing for people of all economic levels. Absent government intervention, either through *Mount Laurel* legislation or inclusionary zoning practices, will the market provide affordable housing?

PROFESSOR VAN DOREN: Well, I grew up in northern New York, near Watertown, for those of you who know upstate. In rural areas, the market supplies very bad housing because there's no zoning, so people don't fuss as much about what's next door to them because there aren't very many affluent people who care. So the mobile home — the mobile home, both new and deteriorated, used mobile homes, and shacks — is, in fact, a private market supply of low-income housing. It's not very good. Actually, my family lived in a trailer from 1969 to 1973, so I have some acquaintance with this. It leaked in the winter. The wind used to go through it and you couldn't

75. In fact, the Public Advocate has recently challenged several certifications issued by COAH as unconstitutional under the *Mount Laurel* doctrine for these very reasons. See, e.g., *In re* Petition for Substantive Certification filed by the Borough of Roseland, 247 N.J. Super. 203, 588 A.2d 1256 (1991); *In re* Petition for Substantive Certification filed by the Twp. of Warren, 247 N.J. Super. 146, 588 A.2d 1227 (1991); *In re* Petition for Substantive Certification filed by the Twp. of Denville, 247 N.J. Super. 186, 588 A.2d 1248 (1991). As this article goes to press, there are a series of proceedings pending before the New Jersey Supreme Court — an appeal by the Borough of Bloomingdale and a petition for certification by the Township of Tewksbury — which many believe will result in "*Mount Laurel IV*." The issues in these cases focus on (1) whether COAH is applying the correct constitutional standard under *Mount Laurel* when making determinations regarding certification; and (2) whether COAH is unlawfully approving plans that are racially exclusive.

heat it, but it is a private market response to low-income housing needs.

The problems with poor people have nothing to do with housing markets. Housing markets, in my view, work fine. Land markets don't, but housing markets work fine. They're competitive, et cetera, et cetera. As far as the supply of structures and the supply of capital, there's no problem. The problem is that poor people don't have much money, so if you care about housing market outcomes, my advice to you is not to worry so much about housing markets and to redistribute wealth to the poor people.

PROFESSOR TRACY KAYE: Mr. Bernard, what does COAH know about the gap between the number of units that have been approved versus built under its jurisdiction? Are there fiscal impediments that are causing this gap? Moreover, does the Fair Housing Act and COAH's mandate encourage any sort of coordination of efforts with federal programs such as low-income housing tax credits?

MR. BERNARD: I'm not sure that the legislation encourages linkage with any federal program. There's a direct linkage by statute to at least one State funding program.⁷⁶ As a matter of practice, many of the developers who are working on building rental housing have worked with the NJHMFA [New Jersey Housing Mortgage Finance Agency], which serves as the broker of tax credits to create the housing. I guess the most prominent example of the place where that's being done is in Bernards Township.

I have read an article that talked about, I think, approvals for something like 25,000 low and moderate-income units.⁷⁷ Now, when will they be built? Well, I think that's a function of the economy. In other words, when people start building again these units will eventually be built.

However, there are impediments towards getting the units built, such as the softening of the condominium market and the delay in getting approvals at the municipal and state level. Sometimes approvals can take three years.

76. Section 20 of the Fair Housing Act requires New Jersey's Neighborhood Preservation Program to establish a revolving fund from which grants or loans are awarded to municipalities whose housing elements have received COAH certification or who are subject to the builder's remedy, and to receiving municipalities in cases where COAH has approved a RCA and project plan developed by the receiving municipality. N.J. STAT. ANN. § 52:27D-320.

77. See Martha Lamar, Allan Mallach & John M. Payne, *Mount Laurel at Work: Affordable Housing in New Jersey, 1983-1988*, 41 RUTGERS L. REV. 1197, 1209 (1989).

Now, part of the *Mount Laurel* mandate was to fast track developments, and that's something that the Council has been weak on. When you have a small staff and you're trying to monitor the whole State, it's very difficult to know what's going on in each community, so if there are delays going on, it's hard to respond to it. The only way we find out in many cases is if a developer complains. Developers are reluctant to complain because they risk creating an adversarial relationship with the municipality and delay the approval process even further. So it's a difficult problem to address, but we're working on it.

PROFESSOR FRANZESE: I'd like to introduce Mr. Steve Eisdorfer. Mr. Eisdorfer is a member of the Public Advocate's Office. He is Deputy Public Advocate for the State of New Jersey.

MR. EISDORFER: I'd like to address a question to Mr. Van Doren. As counsel for the Southern Burlington County N.A.A.C.P., I was a little bit surprised at your characterization of what the purposes of the *Mount Laurel* doctrine are because you didn't talk about the issue that most strongly motivated the original plaintiffs, which is the issue of racial integration.

New Jersey is one of the most racially segregated states in the country in terms of residences and it seemed to the plaintiffs in the original *Mount Laurel* case that exclusionary zoning was an instrument of racial segregation. Indeed, when I talk to municipalities, they always ask me three questions in sequence. They always say first, "Why us?" And second they say, "Can we restrict it [our fair share of affordable housing units] just to our own residents?" And third, "Can it be only senior citizen housing?" And those things all have in common that it should be "us" and not other people, "us" and not "them," and we know who "them" are, and I guess the question I have for you is how does your analysis deal with the problem of race if indeed achieving racial integration or at least undoing the consequences of legally enforced racial segregation is an important consideration? In other words, how, from a market economics point of view, would one deal with that?

PROFESSOR VAN DOREN: I think it's very important that in the initial allocation of zoning rights, we probably ought to give them to the very poor citizens in the first place which, in our society, at least

until recently, consisted of rural whites and more urban blacks.⁷⁸ Then they would get to decide whether or not they would want to sell those rights to more affluent people to allow the affluent to segregate themselves or whether they'd exercise those rights and, in fact, gain entrance to the community in question. I'd let people decide whether or not they want to buy and sell these rights.

MR. PHILLIP DUFFY: Mr. Bernard, I guess this is most appropriately addressed to you. With regard to the regional contribution agreements that were discussed earlier in the program, how many of the rich communities or upper-income communities have already sold off their *Mount Laurel* obligations and what would you attribute that to? As Professor Van Doren suggests, the reason probably is the upper-income areas not wanting low-income families in their communities.

MR. BERNARD: Well, I think that's one of the reasons and I don't want to minimize that reason. I think in some communities they legitimately feel that accepting too much growth in that area would be poor planning and that it would be better planning to create the housing in areas that already have an infrastructure.

Entering into a regional contribution agreement is not that easy to do. The average price to transfer units is about \$20,000 per unit, so it's sometimes difficult for communities to come up with the money. Of the two hundred communities that have achieved either substantive certification or a court settlement, I would say that less than 30 municipalities have participated in these regional contribution agreements.

PROFESSOR FRANZESE: That question was posed by Mr. Phil Duffy, who is a third year law student at Seton Hall. Professor Michael Ambrosio, who is about to speak, is a member of the Affordable Housing Colloquium.

PROFESSOR MICHAEL AMBROSIO: This is for either Mr. Bernard or Mr. Van Doren. Wouldn't that be a burden on property values and thereby put a greater burden on the middle class to take care of this problem of providing affordable housing for the poor and would it be fair for the rich neighborhoods where there is more ability to absorb any regress, if there is any, in property values?

78. See Isabel V. Sawhill, *Poverty in the U.S.: Why is it so Persistent?*, 26 J. ECON. LIT. 1073 (1988).

MR. BERNARD: Can I start first? I think we have to remember a couple of things here. The housing market had gotten to the point in New Jersey such that housing wasn't a problem just for low and moderate-income people. It was a problem for most people in New Jersey. Also, keep in mind that many of the low-income units have been built as part of an inclusionary development where there are up to four market units that are helping to support each low and moderate-income unit. The market units are, in general, more affordable than most of the housing stock in the community. Therefore, for each lower-income unit built, the development community is delivering up to four market units that are often affordable to the middle class. Because of this, it has been said that the people benefitting from the *Mount Laurel* decisions are not lower-income people but the middle class.

MS. SHARI WEINER: My name is Shari Weiner. I'm a first year law student here. I want to talk about the Council. I was mayor of a community in New Jersey during the time that we were approving our *Mount Laurel* plan.

This community was very well-planned. We had reached the maximum population that our targeted infrastructure could support. I, as an elected official, felt the responsibility to uphold *Mount Laurel* and try to do that against the cries and wishes of the senior citizens in the town.

I'd like a justification for how I, as an elected official, and other elected officials, can address citizens when they see what is happening to the community. Why should the State be able to come in and tell us now that we have finished, in our minds, with our community planning, that we have to figure out some way to put in thousands of additional units, whether or not it is the number we had come up with, with the builder's remedy? There was just no way that the town would not suffer in order to fulfill the constitutional mandate that was handed to us.

PROFESSOR VAN DOREN: First of all, I'm fond of telling my students that the notion that suburbs are full strikes me as an odd idea when Hong Kong has a density of 360,000 people per square mile. New Jersey is nowhere near that density. The question is not are we full or not. The question is who has property rights? We can do two things with property rights; we can try to distribute them through majority rule, or we can distribute them by trading and I guess all I'm suggesting is that there's a strong argument that suburbs should never

have had those property rights free in the first place. I'm not focusing on whether or not any people actually ever end up in suburbs, and I don't really care actually.

What I care about is that they have property rights and that they be able to sell them or buy them as they wish and the wealth distribution, in my view of the world, would be very different and it would save your infrastructure. You never have to actually have the people come there and that's fine with me. That's a very market-oriented solution and it's redistributive at the same time.

MR. BERNARD: There are several answers to your question. One is that the supreme court made it clear that the town has to do this [provide its share of affordable housing] and once we get beyond that bare fact, then we have to think of answers that our electorate can deal with.

I suppose one of the things that we're thinking about is that the [Fair Housing] Act really doesn't create a downside for not addressing the need. If you don't address the need, you might wind up in court and a judge is going to make you do something, but as a politician, at least you can blame the judge. If you come forward and do the right thing, then everybody is going to blame you. Regardless, the Council is considering incentives for communities to address the need. The rationale for this is to allow local politicians to go to the electorate and explain why their community should attempt to meet their affordable housing obligation.

PROFESSOR FRANZESE: I'm told that we need to conclude the formal portion of this evening's program and that once we break, we'll reassemble a bit more informally for the purposes of some more exchange. Let me close, with your permission, with a very brief parable that I was thinking a lot about in preparing for this meeting.

There is an elder in a given town and this elder has seen a lot, she's endured a lot, and she knows a lot. In this same town live a group of rather bold and brazen young boys. One day, the ringleader of these boys tells his friend, "You know that old lady? She thinks she knows so much. Well, I'm going to ask her a question that she can't possibly know the answer to. You see this dove in my hand? I'm going to ask her, 'Old lady, is this dove alive or is it dead?' As she thinks about it, I'll put the dove behind my back. If she says it's dead, I'll simply release my hand and let the bird fly free. And if she tells me that the dove is alive, I'll simply break its neck and show her that it's dead. Either way, she'll be wrong."

The youth, now all fired up, finds the town elder and says to her, "This bird that I hold in my hands, is it alive or is it dead?" The elder looks up and says, "Young man, it's in *your* hands." Ladies and gentlemen, it's in all of our hands.

As we continue to explore the legacy and the future of the *Mount Laurel* mandate, I hope that we find the strength and the wisdom to ask the right questions. I'd like to thank our panelists for their participation in this first of our series of exchanges, and I'd also like to thank all of you for making this possible by your presence and support.